No. 22341

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

A. J. BUMB,

Appellant,

vs.

PACIFIC TELEPHONE &
TELEGRAPH CO.,

Appellee.

On Appeal From
The United States District Court
For the Central District of California

APPELLANT'S OPENING BRIEF

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INTRODUCTORY STATEMENT

Appellant is A. J. Bumb, the duly appointed, qualified and acting Receiver for Kendall Industries, Inc., a California corporation, debtor in Proceedings for an Arrangement under Chapter XI of the National Bankruptcy Act (11 U.S.C. §§701-709) when the Order giving rise to this Appeal was entered. Appellee, the Pacific Telephone & Telegraph Company was, at

that time, and still is a public utility corporation rendering telephone service, as a monopoly, within a designated area, including that area in which the business of Kendall Industries, Inc. is located and conducted. The Pacific Telephone & Telegraph Company claims that it was an unsecured creditor of Kendall Industries, Inc. at the time of the filing of the above-mentioned proceeding under the National Bankruptcy Act by reason of non-payment of bills for telephone service and directory advertising rendered Kendall Industries, Inc. prior to said proceeding.

JURISDICTION

The jurisdiction of the District Court is based upon the following sections of the Bankruptcy Act:

(1) Section 343, (11 U.S.C. §743), authorizes the conduct of the Debtor's business for such time, limited or indefinite, as the Court may fix.

(2) Section 2(a) (15), (11 U.S.C. §11[a][15]), grants the Bankruptcy Court summary jurisdiction to make such orders, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of the Bankruptcy Act.

(3) Section 70a(5), (11 U.S.C. §110[a][5]), vests

in the duly-appointed and qualified officer of the Court title to all of the Debtor's property which prior to the filing of the Petition the Debtor could by any means have transferred.

(4) Section 70b (11 U.S.C. §110[b]), authorizes the Bankruptcy Court to extend the time within which an executory contract must be assumed or rejected.

(5) Section 311 (11 U.S.C. §711), grants the Bankruptcy Court exclusive and summary jurisdiction over the Debtor and its property, wherever located

The jurisdiction of this Court to review the Order in question is based upon Sections 24, 25 and 316 of the Bankruptcy Act, (11 U.S.C. §§47, 48 & 716). The pleadings and facts disclosing the basis of the aforesaid jurisdiction are as follows:

(1) On October 19, 1966, Kendall Industries, Inc. filed its Petition for an Arrangement under Section 322 of Chapter XI of the Bankruptcy Act (11 U.S.C. §722) [R. 2-3].

(2) On October 19, 1966, the Referee in Bankruptcy entered his orders appointing A. J. Bumb as Receiver of Kendall Industries, Inc., enlarging the duties of the Receiver pursuant to General Order 40 of the General Orders in Bankruptcy and authorizing and directing the Receiver to

operate the business and manage the property of Kendall Industries, Inc. [R. 44].

(3) By letter dated October 24, 1966, the Pacific Telephone & Telegraph Company advised A. J. Bumb that unless the then billed and outstanding charges for telephone services rendered to the debtor prior to October 19, 1966 were paid by October 31, 1966, such telephone service would be disconnected [R. 51, line 14 - R. 52, line 13].

(4) On November 1, 1966, the Referee in Bankruptcy entered his "Order to Show Cause Why the Time to Accept or Reject Executory Contracts (Pacific Telephone & Telegraph Company) Should Not Be Extended, and Temporary Restraining Order" [R. 45-46] upon the Receiver's Application therefor [R. 47-49].

(5) On November 8, 1966, issue was joined by the filing of the "Response of the Pacific Telephone & Telegraph Company to Petition for Restraining Order" [R. 50-64] and on November 17, 1966 trial of the issues so raised was had before the Referee in Bankruptcy.

(6) On February 6, 1967, the Referee in Bankruptcy filed Findings of Fact and Conclusions of Law [R. 102-109] and, based thereon, filed his Order enjoining, until further order, the Pacific Telephone & Telegraph Company from disconnecting telephone service to the Receiver but directing the Receiver to pay all current charges for such telephone service [R. 110-111].

(7) On February 15, 1967, The Pacific Telephone & Telegraph Company filed its Petition for Review of said Order [R. 112-130].

(8) On March 6, 1967, the Referee filed his Certificate on Petition for Review [R. 131-137] and on May 1, 1967, the matter was heard by the District Judge who ruled that he would reverse the Referee in Bankruptcy and vacate the restraining order [Tr. No. 2, p. 21].[1/]

(9) On May 8, 1967, Findings of Fact and Conclusions of Law [R. 189-197] and a judgment [R. 198-199] were lodged with the District Court by Pacific Telephone & Telegraph Company, to which the Receiver filed Objections on May 15, 1967 [R. 200-235]. After hearing on said Objections, The Pacific Telephone & Telegraph Company lodged new Findings of Fact and Conclusions of Law [R. 236-241] and a Judgment [R. 242-244] with the District Court to which the Receiver filed Objections on June 2, 1967 [R. 248-284].

(10) After hearing on said Objections and on June 12, 1967, The Pacific Telephone & Telegraph Company lodged new Findings of Fact and Conclusions of Law [R. 285-289]

[1/] The transcript of the proceedings before the Referee in Bankruptcy on November 17, 1966, contained in this Court's Exhibit file, is referred to herein as "Tr. No. 1." The transcript of the proceedings before the District Court on May 1, May 22 and June 5, 1967, contained in this Court's transcript file, is referred to herein as "Tr. No. 2."

and a Judgment [R. 290-292], both of which were filed on June 28, 1967, the Judgment being entered on June 29, 1967.

(11) On July 14, 1967, the Receiver filed his Notice of Appeal from the Judgment of June 29, 1967 [R. 297].

STATEMENT OF THE CASE

On October 19, 1966, Kendall Industries, Inc. (hereinafter "Debtor"), filed a Petition under Chapter XI of the Bankruptcy Act (11 U.S.C. §§701-709), seeking to propose to its creditors a Plan of Arrangement to satisfy its obligations. On that date, A. J. Bumb was duly appointed and qualified as the Receiver for the Debtor [R. 2-3, 40-44].

Prior to the commencement of this proceeding on October 19, 1966, the Debtor operated heavy duty machine shops in Montebello, California and El Cajon, California, and a leasing company and hairpiece sales company in Los Angeles, California. Shortly after his appointment, the Receiver discontinued the operation of the hairpiece sales company, closed the El Cajon machine shop facility and removed all of the machinery, equipment and inventory located thereat to the machine shop facility in Montebello, California, where he continued the operation of this machine shop in accordance with the order of the Bankruptcy Court. The machine shop, which produces substantially all of the Debtor's income, fabricates

and manufactures, under sub-contracts, parts and equipment necessary to this country's space exploration program and national defense [R. 40-43, and 47, Tr. No. 1, pp. 11, 32].

Prior to the within proceeding, the Debtor subscribed to certain telephone service and The Pacific Telephone & Telegraph Company (hereinafter "Telephone Company"), installed all of the equipment necessary to render such service in the Debtor's place of business. At that time, the Telephone Company assigned to the Debtor certain telephone numbers, to wit, 723-6361, 728-7221, 685-7127, 723-3406, 685-7348 and 685-7545 [R. 48 and 51].[2/] These telephone numbers were listed by the Telephone Company as those of the Debtor in the various telephone directories which the Telephone Company publishes and causes to be distributed, including the so-called "Classified Directory." Upon the commencement of this proceeding, the Telephone Company advised the Receiver that if he failed to supersede to the numbers theretofore listed to the Debtor by making an arrangement satisfactory to the Telephone Company for the payment of all sums due it, the Telephone Company would discontinue service to the telephone

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[2/] Only the telephone numbers for the machine shop in Montebello, California are in issue. The telephone numbers for the El Cajon machine shop and the Los Angeles hair-piece sales company were disconnected shortly after the initiation of this proceeding at the Receiver's request when he terminated those operations.

numbers listed to the Debtor. The Receiver was further advised of a sum allegedly due from the Debtor to the Telephone Company and that if the Receiver did not wish to supersede, he could have new telephone numbers, but without referral service. In this latter event, the Receiver was advised, a customer or other person dealing with the Debtor who called the numbers theretofore listed to the Debtor would be told that those numbers had been disconnected [R. 48, 51, 52, 53, 103, 104, Tr. No. 1, p. 6].

The Telephone Company admitted:

(1) that the telephone service rendered to the Debtor at the aforedescribed numbers had not been disconnected prior to the initiation of the Chapter XI proceeding;

(2) that the service continued uninterrupted after filing of the Chapter XI Petition (and even before the restraining order was obtained);

(3) that all equipment necessary to render telephone service to the numbers listed to the Debtor was located on the Debtor's premises (with the exception of central office switching equipment and the like);

(4) that if the Receiver desired to continue that service without enlarging it, no further equipment need be installed at the Debtor's place of business;

(5) that in order to transfer such service to the Receiver, the Telephone Company would not have to change

any of its central office equipment or effectuate any change of switching facilities, provided that the service to be rendered remained the same as that rendered to the Debtor; and

(6) as to giving referral service should the Receiver desire a new telephone number, that there is no tariff, rule or regulation or rule of law that requires the Telephone Company to give or not to give referral service [R. 104, 105, Tr. No. 1, pp. 3-4].

Upon his appointment, the Receiver requested that the Telephone Company furnish to him bills for the amounts which it claimed were past due from the Debtor for telephone service and for directory advertising service, together with the normal supersedure forms employed by the Telephone Company so that the amounts claimed could be checked against the Debtor's records [Tr. no. 1, pp. 29-30]. The Telephone Company advised the Receiver that it required he pay the telephone bills and supersede to the telephone numbers utilized by the Debtor. Upon his failure so to do, the Receiver was advised service would be discontinued to the numbers theretofore used by and listed to the Debtor and calls made to any of those numbers would not be referred to any new telephone numbers obtained by the Receiver. The Receiver requested that service be continued to him on the telephone numbers theretofore listed to the Debtor and then being used by him until he could determine whether he would keep any of the said telephone numbers.

The Receiver offered to pay, as an expense of administration, the current operating and service charges due the Telephone Company for service on each and all of the said telephone numbers, but the Telephone Company refused this offer [R. 48, 52, 53, 103, 104, Appellee's Exhibit #1].

On October 24, 1966, when the Telephone Company wrote to the Receiver requesting that he supersede by payment of the past due bill, it advised the Receiver that the sum of $4,459.82 was due [Appellee's Exhibit #1]. The Telephone Company did not then, or at any subsequent time in this proceeding, claim to, nor does it hold security for its alleged claim upon any property of the Debtor [R. 105].

The operation of the Debtor's business by the Receiver required uninterrupted telephone service on its numbers as they existed prior to October 19, 1966, since those numbers were well known to all of the Debtor's customers, suppliers and other persons dealing with it. Further, the disconnection of said telephone numbers, without referral service, would adversely affect the Debtor's business and impede its successful rehabilitation since the major method by which the Debtor conducted its business was over the telephone, utilizing the numbers assigned to it by the Telephone Company prior to October 19, 1966 [R. 105, Tr. No. 1, pp. 11, 31-32].

STATUTES INVOLVED

The statutes involved herein are §§2(a) (15), 70a(5), 70b, 311, 343 and 351 of the Bankruptcy Act [11 U. S. C. §§11(a) (15), 110a(5), 110b, 711, 743 and 751]. These sections are set forth in Appendix A.

INTRODUCTORY ARGUMENT

There is a vital property interest in a telephone number held by a going business concern.

The Debtor was in possession of its telephone numbers and the associated telephone service when this proceeding was initiated and that service had not been disconnected prior to the initiation of this proceeding.

The Telephone Company's tariffs which seek to define what is and what is not "property" are unreasonable, comprise contracts by adhesion and are in conflict with the policy and provisions of the Bankruptcy Act.

The Bankruptcy Court cannot surrender the Congressional grant of jurisdiction over the affairs of the Debtor, including the right to determine and adjudicate creditor claims, to the Telephone Company an unsecured creditor, or to the Public Utilities Commission of the State of California.

The questionable ruling of the Court of Appeals for the Second Circuit in Slenderella is not binding upon this Court, not only because it has not been considered by this Court, but also because it conflicts with the reasoning of the United States Supreme Court, the Court of Appeals for the Seventh Circuit and controlling decisions under California law. Moreover, the rule for which the Telephone Company contends would permit it to obtain preferential treatment in every bankruptcy case where a trustee, receiver or debtor continues to operate the business of the bankrupt-debtor, all in violation of the spirit and purpose of the Bankruptcy Act.

For these reasons, the Referee in Bankruptcy had summary jurisdiction to enter the Order of February 6, 1967, and its reversal by the District Court was error.

The District Court also erred in rejecting some of the Referee's Findings of Fact and in modifying others since all of the Referee's Findings of Fact are substantiated by the evidence and the stipulations of the parties.

SUMMARY OF ARGUMENT

I

The decision of the Court of Appeals for the Second Circuit in the case of Slenderella Systems of Berkeley v. Pacific Telephone and Telegraph Co., 286 F. 2d 488 (C. A. 2,

1961), was wrong when decided, is not binding on this court and no longer reflects the law as to "property" for jurisdictional purposes in bankruptcy.

II

A telephone number and associated services are "property" within the meaning of the Bankruptcy Act.

III

The tariffs of the Pacific Telephone and Telegraph Company which seek to define what is and what is not "property" and which seek to establish a procedure for supersedure are self-serving, unreasonable, comprise contracts by adhesion, would afford the Telephone Company preferential treatment over other creditors of the same class, conflict with the policies and provisions of the Bankruptcy Act and are not binding upon the Bankruptcy Court in determining whether a telephone number and its associated service are "property" within the meaning of the Bankruptcy Act.

IV

The Bankruptcy Court has exclusive jurisdiction to classify creditor claims and to determine and adjudicate the nature and amount thereof, which jurisdiction cannot be usurped by a creditor or an administrative agency of the State of California.

V

The Injunction sought by the Receiver relates to and arises from a matter of administration and, as such, is within the exclusive and summary jurisdiction of the Bankruptcy Court.

VI

The Referee in Bankruptcy correctly decided the question in his Findings of Fact, which Findings of Fact are not clearly erroneous, and the District Court, on review, was without authority to disturb said Findings of Fact or the inferences drawn by the Referee in Bankruptcy from admitted facts.

ARGUMENT

I

THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN SLENDERELLA WAS WRONG WHEN DECIDED, IS NOT BINDING ON THIS COURT AND NO LONGER REFLECTS THE LAW AS TO "PROPERTY" FOR JURISDICTIONAL PURPOSES IN BANKRUPTCY.

The Telephone Company relies upon Slenderella Systems of Berkeley v. Pacific Telephone and Telegraph Co., 286 F. 2d 488 (C. A. 2, 1961) for the proposition that there is no property right in a telephone number and that the Bankruptcy Court, therefore, cannot have summary jurisdiction based upon

possession at the time of the filing of a Petition. This case was wrong as decided, and was never properly the law in California. Further, the decision in Segal v. Rochelle, 382 U.S. 375, 86 S. Ct. 511 (1966), invalidates Slenderella's too restrictive rendering of the term "property."

As in Slenderella, the Telephone Company relies on its Rule 17(D) (Schedule Cal. P.U.C. No. 36-T, 2nd Revised Sheet 63) which provides that "the subscriber has no proprietary right in the number." The same regulatory provision was involved in Slenderella. But the Second Circuit was interpreting California law without the benefit of California law. In Orloff v. Los Angeles Turf Club, 30 Cal. 2d 110, 180 P. 2d 321 (1947), the Court, quoting from Walsh on Equity, said:

> "It is clear that equity protects many rights of a personal character whenever they are rights of substance, often classifying them as property rights in order to bring them within the earlier cases holding that equity will protect property rights only. Business rights of all kinds discussed in the preceding Chapter are not property in the legal sense. Nevertheless, they are valuable rights of economic value, and the reasons for protecting them are identical with the reasons for protecting rights in lands or chattels."

It is clear, therefore, that the Supreme Court of California does not regard "property" in a legalistic sense. It considers any important business right which has a substantive value to the business as "property." This, of course, is the attitude taken by the Supreme Court of the United States in the Segal case, supra. The Court there stated (382 U. S. 377 at 379):

> "The main thrust of Section 70a (5) is to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition. To this end, the term 'property' has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed." [Citations omitted].

In Segal, supra, the Court was considering a contingent tax refund in which there was, of course, no "proprietary" interest at the time. It would be wrong to assume that the States by their statutes or regulatory rules can make and unmake "property" to bring it within or without the bankruptcy jurisdiction. This would thwart the purposes and intent of the Bankruptcy Act, which leaves it to the Bankruptcy Court itself, apart from State law, to determine the meaning of "property" within the purposes of the Bankruptcy Act.

In Board of Trade v. Weston, 243 F. 332 (C. A. 7, 1917), the Court said, at page 335:

> " . . . it would be strange if the dominant grant to Congress to legislate upon bankruptcy and insolvency, and which, when exercised, supersedes state legislation respecting these matters, should nevertheless be subordinate to the right of each State to determine what is or shall be property subject to the terms of the Bankruptcy Act."

The logic of this observation appears also in the cases of Board of Trade of City of Chicago v. Johnson, 264 U. S. 1, 44 S. Ct. 232 (1924) and Garber v. The Bankers' Mortgage Co., 27 F. 2d 609 (D. C. Kan., 1928). While it is normally true that the ownership of property ordinarily depends upon state law, 4 Collier on Bankruptcy, page 1034 (14th ed.), states, "It is clear, of course, that in the event of any conflict between the State law and the Bankruptcy Act, the State law must yield."

In the case of Barutha v. Prentice, 189 F. 2d 29 (C. A. 7, 1951), the Court was dealing with the language of a Wisconsin statute which held that no certificate or license issued thereunder should be construed to be irrevocable or to confer any property right on the holder thereof. The Court said, at page 30:

"The obvious purpose of the legislature . . . was to prevent the holder of such a license from raising a constitutional question as to his property rights in the license in the event it became necessary in the proper administration of the Act for the Commission to revoke the license or to refuse to approve a transfer thereof. . . . A recent case decided by this court, In re Rainbo Express, 7 Cir., 179 F. 2d 1, 5, held that a certificate of public convenience and necessity issued by the Interstate Commerce Commission was 'endowed with a proprietary interest capable of transfer.' . . . the trustee there insisted that such a certificate was not personal property which could be effectively mortgaged 'since it is a mere license or permit, personal in nature and transferrable only pursuant to such rules and regulations'; and that 'prior to approval by the Commission, there is no proprietary interest in the certificate holder to which a lien may attach.'

"After carefully reviewing and considering the conflicting decisions on the subject, this court said, 179 F. 2d at page 5: 'Upon reason and authority we think it clear that such a certificate is endowed with a proprietary interest capable

of transfer. . . .'"

The Court then likened this to the Board of Trade membership and concluded, at page 31:

> "The record indicates that the operating rights under this license were of considerable value. Whether such operating rights be called 'property' or an 'asset,' or something else, we see no valid reason why such operating rights should not be considered and treated as part of the bankrupt estate and be sold by the trustee, subject to the approval of the Public Service Commission, for the benefit of the creditors."

The Bankruptcy Court has an interest in protecting the operations of the Debtor in order to preserve the value of the property in custodia legis for the benefit of all the creditors and, in proceedings under the rehabilitative provisions of the Bankruptcy Act, as here, for the rehabilitated Debtor. The value of a going business depends upon goodwill and, in this modern day, ease of communication. Protection of property rights, therefore, must have the business meaning indicated in the Orloff case, (and in the bankruptcy cases cited above), and not the narrow construction of "proprietary" rights given it in the Slenderella case. The time has come to depart from the self-defeating concept of the Slenderella case that property can be removed from the

jurisdiction of the Bankruptcy Court by some regulatory rule which arbitrarily defines it as non-property.

Notwithstanding the rules of the Public Utilities Commission, it is clear to all that the Telephone Company cannot deal arbitrarily with the numbers it assigns its subscribers, and that a court of equity would and should restrain such arbitrary dealings where the retention of a number is a vital element in preserving the sale value of a business or its operation, as it is in this case. It would be shocking indeed if the Public Utilities Commission were permitted to negative the Bankruptcy Court's jurisdiction over a valuable asset of this estate. The substantial value of the Debtor's telephone numbers, in that they are essential to the continued operation of the Debtor's business, is clear [R. 105, Tr. No. 1, p. 11]. Further, that a particular telephone number is intrinsically valuable was conceded by counsel for the Telephone Company at the hearing before the Referee in Bankruptcy [Tr. No. 1, pp. 5-6] and was also established at that hearing by testimony introduced in behalf of Appellant [Tr. No. 1, pp. 7-8, 12-14].

II

A TELEPHONE NUMBER AND ASSOCIATED SERVICES ARE "PROPERTY" WITHIN THE MEANING OF THE BANKRUPTCY ACT.

Section 70a (5) of the Bankruptcy Act [11 U. S. C. §110a (5)] provides that the trustee of the estate of a bankrupt

shall be vested with the title of the bankrupt to any ". . . property, . . . which prior to the filing of the petition he could by any means have transferred . . ." The Telephone Company's Rule 23(B) (SCHEDULE CAL. P.U.C. NO. 36-T, Third Revised Sheet 72) [R. 63], provides that a new subscriber may take over the telephone services rendered to a discontinuing subscriber on the premises where that service is being rendered if a written notice to that effect from both parties is presented to the Telephone Company and where the new subscriber agrees to pay all of the obligations of the out-going subscriber. The effect of this rule is to permit a subscriber to transfer his telephone number to another subscriber, on the same premises, with the consent of the Telephone Company, which consent, presumably, will be rendered if the intended assignee agrees to pay all of his assignor's obligations to the Telephone Company. Thus, as shown by the Record, a particular number is an asset and is transferrable, albeit with the consent of the Telephone Company [R. 286]. It is difficult to see, therefore, how the Telephone Company can claim that the telephone service and number listed to the Debtor is not property even in the strict legalistic sense merely because the Telephone Company has promulgated a Rule saying so [Rule 17(D), SCHEDULE CAL. P.U. C. NO. 36-T, Second Revised Sheet 63, R. 62], since the Telephone Company by its Rule 23(B), supra, makes the service and telephone number

assignable; and the right to assign, even if conditioned, has long been an incident of "property."

The cases cited hereinabove require, by analogy, that the telephone numbers and service rendered to the Debtor by the Telephone Company be termed "property." For example, in Board of Trade of City of Chicago v. Johnson, 264 U.S. 1 (1924), the United States Supreme Court held that a membership in the Commodity Exchange was "property" which passed to the trustee in bankruptcy under the provisions of §70a (5) of the Bankruptcy Act [11 U.S.C 110a (5)]. That case, together with Board of Trade v. Weston, 243 F. 332 (C.A. 7, 1917), which reached the same conclusion, dealt with a membership in the Chicago Commodities Exchange, the rules of which are surprisingly similar to the Telephone Company's tariffs herein. Those rules provide that the member could transfer his membership only upon the approval of the Board and such approval was, by the rules of the Board, predicated on good standing and the payment of all past due obligations. The Telephone Company's tariff governing supersedure [Rule 23(B)] likewise permits the transfer of a telephone number from a discontinuing subscriber to another party, subject to the Telephone Company's approval and the payment of all unpaid charges. The restriction on transferability was held, in the Weston case, only to " ... affect the value of a seat in a Stock Board, not its existence as property." (243 F. 332, 336).

(Emphasis supplied.)

The United States Supreme Court reached the same conclusion in the Johnson case, supra. It is difficult to see how a contrary conclusion could be reached in the instant case, since we are dealing with a similar, intangible right. In the Commodity Exchange cases, the right concerned the use of the facilities of the Exchanges. In the instant case, the right concerns the facilities provided by the Telephone Company and the telephone number assigned to those facilities and listed to the Debtor.

In the Johnson case, supra, the Supreme Court held that the definition of "property," as used in §70a(5) of the Bankruptcy Act [11 U.S.C. §110a (5)], was not to be limited by the interpretation placed on the term "property" by state law, saying that when ". . . the language of Congress indicates a policy of broader construction of the statute [the Bankruptcy Act] than the State decisions would give it, Federal Courts cannot be concluded by them" (264 U.S. 1, 10). This Supreme Court ruling, together with its ruling in Segal v. Rochelle, supra, clearly establishes the fallacy of the Telephone Company's assertion that because its tariffs say that a telephone number is not "property" there was never any "property" in the actual or constructive possession of the Debtor which passed into the possession and control of the Bankruptcy Court upon the filing of the within proceeding.

The Segal case, supra, is particularly significant since, in interpreting the word "transfer" the Court concluded that, if the transferee's interest would be protected by a court of equity, a transfer satisfying §70a (5) [11 U.S.C. §110a (5)] was accomplished, even though the transfer would not be recognized by a court of law. On this point, Justice Harlan said (382 U.S. 375, 385):

> "Yet it remains true that a Texas court of equity could and would compel the assignment of any refund received, if indeed it might not try to compel a reluctant assignor to collect the claim or make it over by a valid assignment when that became possible. This, we believe, suffices to make the Segals' claims transferable within the meaning of §70a (5)."

As appears from the Orloff case, supra, the California courts recognize business rights of all kinds as possessing value and entitled to the protection of a court of equity. Since a California court of equity, therefore, would protect a telephone number transferred to an assignee in compliance with the Telephone Company's Rule 23(B) against any arbitrary attempt by the Telephone Company to abrogate that assignment, then, under Segal, the telephone number is both "property" and capable of "transfer" under §70a (5) of the

Bankruptcy Act [11 U.S.C. §110a (5)].

Considering the foregoing trend exhibited by the modern cases in broadening the concept of "property" to include various forms of intangibles, the Slenderella case relied upon by the Telephone Company represents a decision wholly without logic in its concept of basic values. No effect was given by the rendering Court in that case to the concept that a telephone number and telephone service are, in today's world of business, a valuable asset. This fact was established by the Receiver's testimony and was not controverted by the Telephone Company [Tr. No. 1, pp. 11-14]. Viewed in these circumstances, the relief sought by the Receiver is neither startling nor a departure from the existing law at all. Nor should this court abdicate its function of augmenting and contributing to the dynamic expansion of the law by refusing to reconsider an unsatisfactory court-made rule, such as that espoused in Slenderella. As was said by Mr. Justice Desmond of the Court of Appeals of the State of New York in Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (1951):

> "Our Court said, long ago, that it had not only the right, but the duty to re-examine a question where justice demands it (Rumsay v. New York and N.E.R.R. Co., 133 N.Y. 79, 85, 86, 303 N.E. 654, 655, and see Klein v. Maravelas, 219 N.Y. 383,

114 N. E. 809). That opinion notes that Chancellor Kent, more than a century ago, had stated that upwards of a thousand cases could then be pointed out in the English and American Reports 'which had been overruled, doubted or limited in their application' and that the Great Chancellor had declared that decisions which seem contrary to reason 'ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error.' And Justice Sutherland, writing for the Supreme Court in Funk v. United States (290 U. S. 371, 382, 54 S. Ct. 212, 215, 78 L. Ed. 369), said that while legislative bodies have the power to change old rules of law, nevertheless, when they fail to act, it is the duty of the Court to bring the law into accordance with present day standards of wisdom and justice rather than 'with some outworn and antiquated rule of the past.' "

III

THE TARIFFS OF THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY WHICH SEEK TO DEFINE WHAT IS AND WHAT IS NOT "PROPERTY" AND WHICH SEEK TO ESTABLISH A PROCEDURE FOR SUPERSEDURE ARE SELF-SERVING, UNREASONABLE, COMPRISE CONTRACTS BY ADHESION, WOULD AFFORD THE TELEPHONE COMPANY PREFERENTIAL TREATMENT OVER OTHER CREDITORS OF THE SAME CLASS, CONFLICT WITH THE POLICIES AND PROVISIONS OF THE BANKRUPTCY ACT AND ARE NOT BINDING UPON THE BANKRUPTCY COURT IN DETERMINING WHETHER A TELEPHONE NUMBER AND ITS ASSOCIATED SERVICE ARE "PROPERTY" WITHIN THE MEANING OF THE BANKRUPTCY ACT.

Assuming, arguendo, that the Telephone Company's tariffs form a part of its contract with the subscriber, which the Receiver does not admit, an examination of the circumstances surrounding their promulgation, the acceptance by any subscriber of the contract and the only method available to any subscriber to attack these tariffs and the contract clearly demonstrate that the Telephone Company has placed itself in a superior, if not supreme bargaining position.

To oppose the Telephone Company's promulgation of a tariff or to seek to have a tariff modified or rescinded, a subscriber must resort either to an action in the courts or an administrative proceeding before the Public Utilities Commission of the State of California. Either course of

action is, obviously, too demanding for the ordinary subscriber who does not anticipate the dire consequences of his failure to so object. Further, what choice does the ordinary subscriber have? If he wishes to have telephone service at all, he must accept the contract proposed by the Telephone Company, for there is no other telephone company with which he can deal. The California Courts have long recognized such a situation as presenting a contract by adhesion. Thus, in Gray v. Zurich Insurance Company, 65 Cal. 2d 263, 269, 419 Pac. 2d 168 (1966), the California Supreme Court said:

> ". . . a contract entered into between two parties of unequal bargaining strength, expressed in the language of a standardized contract, written by the more powerful bargainer to meet its own needs, and offered to the weaker party on a 'take it or leave it' basis carries some consequences that extend beyond orthodox implications. Obligations arising from such a contract inure not alone from the consensual transaction but from the relationship of the parties." See also Stevens v. Fidelity and Casualty Co., 58 Cal. 2d 862, 377 Pac. 2d 284 (1962); Tunkl v. Regents of University of

California, 60 Cal. 2d 92, 383 Pac. 2d 441 (1963); 6 A. L. R. 2d 693; Neal v. State Farm Insurance Co., 188 Cal. App. 2d 690, 10 Cal. Rptr. 781 (1961); Lagomarsino v. San Jose Title Insurance Co., 178 Cal. App. 2d 455, 3 Cal. Rptr. 80 (1960).

The doctrine of "contract by adhesion" requires that in view of the disparate bargaining status of the parties we must ascertain that meaning of the contract which the weaker party would reasonably or legitimately expect by way of services according to the enterpriser's "calling," and to what extent the stronger party disappointed reasonable expectations based on the typical life situation. See Kessler, Contracts of Adhesion, 43 Columbia Law Review 629 (1943); Patterson, The Interpretation and Construction of Contracts, 64 Columbia Law Review 833 (1964).

When a subscriber seeks telephone service, there is not exhibited to him any of the tariffs pursuant to which the Telephone Company operates. Instead, at best, when he receives his monthly bill, he will find on the back of it, if he is curious enough to read the back of his bill, a statement advising when the bill is due and payable, that service may be discontinued if it is not paid and the procedure for contesting the amount set forth in the bill. There is not even a statement to the effect that telephone service is rendered

pursuant to tariffs on file with the Public Utilities Commission to which resort must be had if the subscriber wishes to learn the terms of these tariffs. Is this what the reasonable man would expect when he enters into an agreement with the company which is given a monopoly in its field of operation ?

In any event, it is inherent from the Telephone Company's position that what the reasonable may may expect is not important. What is important is what the Telephone Company wants [Tr. No. 1, pp. 4-7, 35-36 and 40-41]. The reasonable man would expect that when he obtains a telephone, that telephone number is his to use as he sees fit in the establishment and conduct of his business. He can also reasonably expect that as his customers become acquainted with his telephone number they will expect to be able to reach him at that telephone number and that, over the years, that telephone number will acquire value and become an asset of his business. And, if the number must be changed, he expects that there will be a referral service so that he does not disappear.

However, if we give full effect to the position advanced by the Telephone Company, that reasonable expectation is to be denied. The effect of this position in the light of today's business demands for ready, easy and sure communication between parties is not only to destroy that which may comprise

the major asset of a business but also to disregard the "reasonable layman" doctrine enunciated by the California Courts. See Stevens v. Fidelity and Casualty Co., supra, ; Ransom v. Penn Mutual Life Insurance Co., 43 Cal. 2d 420, 274 Pac. 2d 633 (1954). Further, recognition of the Telephone Company's position denies the implied covenant in all contracts that the parties will act in good faith. See Milton v. Hudson Sales Corp., 152 Cal. App. 2d 418, 313 Pac. 2d 936 (1957).

To give effect to the Telephone Company's tariffs and require the Receiver to make the payment demanded by the Telephone Company would not only defeat the "reasonable layman" and "reasonable expectations" tests enunciated above, but would permit the Telephone Company to receive that which the Bankruptcy Act abhors most; preferential treatment by receiving a greater percentage of its claim than all of the other creditors of the same class. As noted previously, the Telephone Company does not lay claim to any security for its claim and has admitted that it is an unsecured creditor. The testimony below establishes [Tr. No. 1, p. 31] as does the record [R. 105 and 106] that in the event of an adjudication the unsecured creditors would receive substantially less than 100 cents on the dollar in satisfaction of their claims. To permit such a self-serving and inequitable result to obtain because of the Telephone Company's superior bargaining position flies in the face of reason and good

conscience.

To permit, therefore, this "contract by adhesion" to be determinative of what is or is not "property" for purposes of determining what is the jurisdiction of the Bankruptcy Court is in violation of the basic policies and provisions of the Bankruptcy Act. That such tariffs are not binding upon the Bankruptcy Court is clear from the unambiguous ruling of the Supreme Court in Board of Trade of City of Chicago v. Johnson, 264 U. S. 1, 44 S. Ct. 232 (1924) wherein it was held that the Fdederal Courts cannot be concluded by narrow language in state laws or state court decisions when Congress has indicated a policy of broad construction of a statute, such as is the case in the Bankruptcy Act. Further, effect must be given to the undisputed evidence that the "property" was in the possession of the Debtor when the within proceeding was filed and continued in the possession of the Receiver even before the Referee in Bankruptcy issued his Restraining Order on November 1, 1966 [R. 104]. Since the telephone number and the associated telephone service is in every sense of the word "property" and is capable of "transfer" within the meaning of §70a (5) of the Bankruptcy Act [11 U. S. C. §110a (5)], it passed into the jurisdiction of the Bankruptcy Court upon the filing of the within proceeding. As was said in the Johnson case, supra, :

"The membership is property in a way attached to the person of the bankrupt and disposable only by his will. It follows him, therefore, into the Bankruptcy Court, which is given full equitable jurisdiction over his conduct in respect of his estate, and therefore comes into the custody of that Court to be administered by it as part of his estate.

"The Board is not in an adverse attitude toward the bankrupt. It holds the membership for the bankrupt in conformity to the rules as to his enjoyment and disposition of it . . . and that in Bankruptcy . . . it . . . passes into the control, and therefore into the possession of the Trustee" (264 U.S. 1, 12 and 13).

For these reasons, there is no doubt but that a telephone number is "property" and it being in the possession of the Debtor at the inception of this proceeding, passed into the jurisdiction of the Bankruptcy Court without being affected by the self-serving restraint sought to be imposed thereon by the Telephone Company's tariffs.

IV

THE BANKRUPTCY COURT HAS EXCLUSIVE JURISDICTION TO CLASSIFY CREDITOR CLAIMS AND TO DETERMINE AND ADJUDICATE THE NATURE AND AMOUNT THEREOF, WHICH JURISDICTION CANNOT BE USURPED BY A CREDITOR OR AN ADMINISTRATIVE AGENCY OF THE STATE OF CALIFORNIA.

The Receiver relies, in addition to §70a (5) of the Bankruptcy Act as noted hereinabove [11 U.S.C. §110a (5)], upon §311 of the Bankruptcy Act (11 U.S.C. §711), which provides that the Chapter XI Court has exclusive jurisdiction of the Debtor and his property, wherever located. This Section is derived from former §§74(m) and 77(B)(a) of the Bankruptcy Act [11 U.S.C. former §§202(m) and 207(a)], 8 Collier on Bankruptcy, page 176, footnote 1 (14th ed.). The same provision is contained in §111 of Chapter X and §411 of Chapter XII of the Bankruptcy Act (11 U.S.C. §§511 and 811, respectively). It therefore follows that the interpretation placed upon these sections by the Courts are likewise applicable to §311 of Chapter XI (11 U.S.C. §711).

Chapter XI of the Bankruptcy Act (11 U.S.C. §§701-799) provides an integrated system for the rehabilitation of a financially distressed business, such as the Debtor. Under the supervision of the Bankruptcy Court, the interests of the various creditors are adjusted and reconciled with the

preservation of the enterprise as a going concern. To accomplish this result, the Chapter XI Court is granted broad powers. Included among these powers is the grant of jurisdiction set forth in §311 of the Bankruptcy Act (11 U.S.C. §711). In addition, the Bankruptcy Court is granted the power to stay or enjoin other proceedings (§314, 11 U.S.C. §714), to fix the division of creditors into classes and to determine any controversy between them (§351, 11 U.S.C. §751) as well as the right to inquire into the validity of an alleged debt or obligation of the debtor. Lesser v. Gray, 236 U.S. 70, 35 S. Ct. 227 (1914). See also U.S. Fidelity and Guarantee Co. v. Bray, 225 U.S. 205, 32 S. Ct. 620 (1911). Consequently, the Bankruptcy Court has exclusive jurisdiction over the administration of the Estate and is not at liberty to surrender it. Mangus v. Miller, 317 U.S. 178, 63 S. Ct. 182 (1942); U.S. Fidelity and Guarantee Co. v. Bray, supra. See also In re Fine Arts Corporation, 136 F. 2d 28 (C.A. 6, 1943); In re Terrace Lawn Memorial Gardens, 256 F. 2d 398 (C.A. 9, 1958).

As noted previously, the telephone service and numbers in question are "property" of the Debtor, both in the equity and bankruptcy sense and in the strict legalistic sense. Consequently, the Bankruptcy Court, under §311 of Chapter XI (11 U.S.C. §711), had jurisdiction over the subject matter of this controversy. Essentially, the controversy is one which centers around the payment of the sums claimed by the Telephone Company. The

effect of the Telephone Company's procedure for supersedure is that it is seeking to deprive the Bankruptcy Court of the Congressional grant of authority to adjudicate the claims of creditors, including that of the Telephone Company.

This follows from the Telephone Company's Rule 23 (B), supra, which seeks to compel the Receiver to pay the Telephone Company's unsecured claim in full before the Telephone Company will continue the telephone service heretofore rendered the Debtor or permit the Receiver to supersede [3/]. The gravamen of this attempt lies not so much in the amount sought to be collected, which, parenthetically, could seriously impede and interfere with the Receiver's continued operation of this business, as it does with the fact that the Receiver is prevented from contesting both the validity and the amount of the Telephone Company's claim and in bringing that controversy before the Bankruptcy Court. This result follows from the Telephone Company's Rule 11 (A) 4 (Schedule Cal. P.U.C. No. 36-T, 2d Revised Sheet 50) [R. 60], which provides:

> "In case of a dispute between subscriber and the Company as to the correct amount of a bill . . .

[3/] Nor will the Telephone Company give referral service to the Receiver unless the alleged past due bill is paid in full, since otherwise, the Telephone Company claims, its procedure for supersedure would be circumvented and it would be relegated to the same position as the other unsecured creditors (Tr. No. 2, pp. 52-53).

> which cannot be adjusted with mutual satisfaction, the subscriber may deposit with the Public Utilities Commission of the State of California ... the amount claimed by the Company to be due .... Failure on the part of the subscriber to make such deposit ... within 15 days after notice by the Company that such deposit must be made or service may be discontinued, shall warrant the Company in discontinuing the service without further notice."

Note that when, on October 24, 1966, the Telephone Company advised the Receiver of the amount claimed by the Telephone Company [Appellee's Exhibit #1], the amount stated as due and owing was $4,459.82. When, on November 8, 1966, the Telephone Company filed its response to the Receiver's Application for a Temporary Restraining Order, it stated the amount to be due and owing as $3,980.36 [R. 51]. Yet by adding up the figures set forth in the Telephone Company's said Response [Paragraph IV, R. 51] only the amount of $2,006.80 appears to be due and owing despite the fact that that same paragraph claims the sum of $3,980.36. At no time during the proceedings below did the Telephone Company waver in its claim for the sum of $3,980.36 as is clear from its Findings of Fact lodged on May 8, 1967 (Finding of Fact #9)

[R. 194], its Findings of Fact lodged on May 26, 1967 (Finding of Fact B) [R. 237]. See also Tr. No. 2, pp. 26 & 47.

The unreasonableness of this situation is clear. The Telephone Company's Exhibit 1 claiming $4,459.82 was prepared and presumably mailed to the Receiver on October 24, 1966, just five days after the Receiver had been appointed. That letter demanded that the Receiver pay $4,459.02 to the Telephone Company on or before October 31, 1966, else the telephone service would be disconnected. This is hardly a reasonable period of time for the Receiver to check this particular bill through the Debtor's records, considering the size of the Debtor's operation, the state of its records, the fact that it was unable to file with its Chapter XI Petition its Schedules listing its assets and liabilities [R. 3] but could only file a hand-written list of creditors therewith [R. 8-39] in which the Telephone Company appears in different places and for varying amounts.

Note also that the Telephone Company's letter of October 24, 1966 [Exhibit 1] flatly stated that if the amount claimed therein were not paid by October 31, 1966, telephone service would be disconnected. Nor did that letter advise the Receiver of his right to dispute the amount of the bill as provided for in the Telephone Company's Rule 11(A) 4 [R. 60]. Had that option been made known to the Receiver,

by the Telephone Company, it is apparent that no amicable adjustment thereof could have been effected without a deposit with the Public Utilities Commission of the State of California of the amount claimed in the Telephone Company's Exhibit 1. Any disposition of the dispute would then have been subject, time-wise, to whatever calendar or other problems with which the Public Utilities Commission of the State of California may then have been confronted. Nor is it clear from the Telephone Company's said Rule 11(A) 4 whether a hearing would have been afforded the Receiver. Thus does the Telephone Company seek to oust the Bankruptcy Court from its jurisdiction over the rehabilitation of the Debtor and the determination of the class into which the Telephone Company would be placed as well as the validity and amount of its claim.

A similar situation was presented in In the Matter of Muskegon Motor Specialists International Union, etc., v. Davis, Trustee of Muskegon Motors, 313 F. 2d 841 (C.A. 6, 1963), Cert. denied, International Union United Auto., etc., AFL-CIO v. Davis, 375 U.S. 832 (1963). There, the Union claimed vacation pay for employees for a stated period. It claimed that although the division of the employer had closed its plant and had no employees as of the date of determining seniority or for vacation pay purposes, the employer should nevertheless pay for the vacations to which the employees would have been entitled had the employer remained in business. Upon refusal

of the employer to accede to this demand, the Union demanded arbitration and thereafter filed suit in the District Court to compel arbitration. Subsequently, the employer filed a Petition under Chapter XI of the Bankruptcy Act which was thereafter amended to comply with Chapter X of the Bankruptcy Act. The Trustee was added as a party defendant and also filed a petition for an order rejecting the executory provisions of the collective bargaining agreement. The District Court refused to surrender its jurisdiction to arbitration. The Court of Appeals affirmed, holding that §111 of Chapter X of the Bankruptcy Act (11 U.S.C. §511), which is identical to §311 of Chapter XI of the Bankruptcy Act (11 U.S.C. §711), conferred exclusive jurisdiction upon the Bankruptcy Court to determine and adjudicate the proof and allowance of claims as well as the validity and amount thereof. It found further, that the District Court did not abuse its discretion in refusing to surrender jurisdiction in favor of arbitration since the res was in custodia legis. The precise situation obtains in the instant case since both the telephone service and telephone numbers are and have been in the possession of the Bankruptcy Court since the inception of the within proceeding and, since the date of his appointment, in the possession of the Receiver.

V

THE INJUNCTION SOUGHT BY THE RECEIVER RELATES TO AND ARISES FROM A MATTER OF ADMINISTRATION AND, AS SUCH, IS WITHIN THE EXCLUSIVE AND SUMMARY JURISDICTION OF THE BANKRUPTCY COURT.

The Bankruptcy Court has exclusive and summary jurisdiction with respect to all proceedings in bankruptcy in the course of administration of the estate. As stated in 2 Collier On Bankruptcy page 450 (14th Edition):

> "With respect to all proceedings in bankruptcy in the course of administration the Bankruptcy Court may act summarily and in that manner determine the rights of the parties affected."

And, as noted previously, once that jurisdiction vests in the Bankruptcy Court, it may not be surrendered. See Mangus v. Miller, supra, U. S. Fidelity and Guarantee Co. v. Bray, supra, In re Fine Arts Corporation, supra, and In re Terrace Lawn Memorial Gardens, supra. Section 343 of the Bankruptcy Act (11 U.S.C. §743) authorizes the conduct of a Debtor's business for such time, limited or indefinite, as the Court may fix. The Order appointing the Receiver directed him to operate the business of the within estate [R. 40-46] and enlarged his duties pursuant to General Order 40 of the General Orders In Bankruptcy. Section 70(b) of the Bankruptcy Act (11 U.S.C.

§110b) authorizes the assumption or rejection of executory contracts within the periods therein stated and further authorizes the Court, for cause shown, to extend or reduce the time for such acceptance or rejection. Section 2(a)(15) of the Bankruptcy Act (11 U.S.C. §11[a][15]) authorizes the Bankruptcy Court to make such Orders, in addition to those specifically provided for, as are required to enforce the provisions of the Bankruptcy Act.

It appears then that the Receiver was confronted with a direction of the Bankruptcy Court to operate the Debtor's business; that he was almost immediately confronted with the demand from an alleged creditor for the payment of a large sum of money or the telephone service necessary to the operation of that business would be disconnected. Clearly, what was involved was a determination whether to assume or reject an executory contract and under what circumstances. Such contract clearly grew out of and was an administrative matter, since it related to an obligation sought to be imposed upon the Debtor and the Receiver in conjunction with the operation of the business of the Debtor and in no way sought to alter the legal relationship between the parties. The Receiver, confronted with an arbitrary demand, an arbitrary time limit and voluminous records to wade through in order to determine the correctness of that demand, sought and seeks only to have the time imposed by that demand and by §70b of the Bankruptcy Act

(11 U.S.C. §110b) extended. Surely, as a matter of administration, the Receiver's Application and the Bankruptcy Court's Order To Show Cause and Temporary Restraining Order fall within the Congressional grant of authority contained in §2(a)(15) of the Bankruptcy Act (11 U.S.C. §7[a][15]) in furtherance of the purposes expressed in §70b of the Bankruptcy Act (11 U.S.C. §110b). The jurisdiction and power thus granted the Bankruptcy Court by Congress was and is sufficient to sustain the Order made by the Referee In Bankruptcy on February 6, 1967.

VI

THE REFEREE IN BANKRUPTCY CORRECTLY DECIDED THE QUESTION IN HIS FINDINGS OF FACT, WHICH FINDINGS OF FACT ARE NOT CLEARLY ERRONEOUS, AND THE DISTRICT COURT, ON REVIEW, WAS WITHOUT AUTHORITY TO DISTURB SAID FINDINGS OF FACT OR THE INFERENCES DRAWN BY THE REFEREE IN BANKRUPTCY FROM ADMITTED FACTS.

In the Findings of Fact filed by the District Court on June 28, 1967 [R. 285-287,] the District Judge accepted the Referee's Findings of Fact for the most part, but rejected, in whole or in part, four of those Findings of Fact and modified another Finding of Fact. The Referee's Findings of Fact thus affected are No. 4, No. 6, No. 20, No. 23 (although in the District Court's Findings of Fact this is denominated as Referee's Findings of Fact No. 21) and No. 24. These Findings

of Fact are set forth verbatim in Appendix B. However, the District Court did not take testimony, did not observe the demeanor of the witnesses who testified before the Referee in Bankruptcy and had no basis for concluding that the Referee's Findings of Fact were clearly erroneous [Tr. No. 2, pp. 25-26].

The Referee's Findings of Fact are all substantiated by the evidence presented below. As to the Referee's Finding of Fact No. 4, see Transcript No. 1, pages 11 through 14 and 16; as to the Referee's Finding of Fact No. 6, see Receiver's Application for Extension of Time, paragraph 4 [R. 48-49] as to which there is no denial contained in the Telephone Company's Answer; as to the Referee's Finding of Fact No. 20, the Telephone Company's Rule 11(A) is set forth from which the Referee inferred that to give effect thereto would be to deprive the Bankruptcy Court of its jurisdiction to adjudicate claims; as to the Referee's Finding of Fact No. 23, see Transcript No. 1, pp. 15-17; and as to Referee's Finding of Fact No. 24, see Transcript No. 1, pp. 12, 16-17 and 31.

General Order No. 47 of the General Orders In Bankruptcy provides:

> "Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge

shall accept his findings of fact unless clearly erroneous. The judge at the hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

It is noted that at the hearing before the Referee in Bankruptcy counsel for the Telephone Company introduced no evidence to refute the testimony offered by the Receiver nor did counsel for the Telephone Company object to that testimony. The testimony offered by the Telephone Company was, on motion of the Receiver, stricken from the record as not material to the issues. As noted above there were no evidentry hearings before the District Court on the Petition for Review or on the Receiver's Objections to the Findings of Fact proposed to the District Court by the Telephone Company.

It has long been the rule in this Circuit that the Judge shall accept the Referee's Findings of Fact unless clearly erroneous. This for the reason that the Referee has heard the witnesses and had the opportunity to observe their manner and demeanor and to resolve conflicts in the testimony. Thus, the Referee's Findings of Fact are conclusive upon review by the District Court unless clearly erroneous and should not be disturbed by the District Judge unless there is most cogent evidence of mistake or miscarriage of justice. And it has been

said that a District Judge may not set aside a Referee's order merely because the testimony might lead the Judge to different conclusions from those reached by the Referee; before his judgment may be reversed, the Judge must find that no testimony exists in support of it, or that the Referee has acted arbitrarily and capriciously.

Earhart v. Callan,
221 F. 2d 160 (C.A. 9, 1955)
Cert. denied 350 U.S. 829 (1955);

In re California Associated Products Co.,
183 F. 2d 946 (C.A. 9, 1950);

In re Cummings,
84 F. Supp. 65 (S.D. Cal. 1949);

Ott v. Thurston,
76 F. 2d 368 (C.A. 9, 1935);

Ingram v. Lehr,
41 F. 2d 169 (C.A. 9, 1930).

As was stated by District Judge Yankwich,

"The Referee is entitled not only to the full benefit of his own choice of contradictory versions of a transaction, but to his own inferences from even admitted facts."

In re Cummings,
84 F. Supp. 65, 67 (S.D. Cal., 1949).

And this Court, in Lundgren v. Freeman, 307 F. 2d 104 (C.A. 9, 1962), held, in considering the effect of Rule 52(a) of the Federal Rules of Civil Procedure (28 U.S.C. 52[a]) on the reviewing court's power to disregard the trial court's findings

of fact, that the Appellate Court may not substitute its judgment if conflicting inferences may be drawn from the established facts by reasonable men, (page 113) and that the clearly erroneous test applies even though it seems the basic facts are undisputed (page 115). Most recently, in the case of Snider v. England, 374 F. 2d 717 (C.A. 9, 1967), this Court said (page 720) that

> "... the 'clearly erroneous' test applies 'even though it seems the basic facts are undisputed,' [citations omitted] ... because the finding in such a case is 'based on the "fact-finding tribunal's experience with the mainsprings of human conduct".'".

In light of the foregoing, the failure of Telephone Company counsel to object to the Receiver's testimony before the Referee, the lack of an evidentry hearing before the District Court and the substantiation of the Referee's Findings of Fact by the evidence and pleadings, the District Court erred in rejecting and modifying the Findings of Fact set out hereinabove and in making its own Findings of Fact. The District Court's Findings of Fact should, therefore, be rejected by this Court and the Referee's Findings of Fact should be adopted in full.

CONCLUSION

A telephone number and its associated service are clearly property within the meaning of §70a(5) of the Bankruptcy Act (11 U.S.C. §110a[5]) and, consequently, the Debtor's telephone number and the service associated therewith, not having been disconnected prior to the initiation of the within proceeding, were in the possession of the Debtor at the time that it filed its Petition herein and passed into the exclusive jurisdiction of the Bankruptcy Court, as that jurisdiction is conferred and defined by §311 of Chapter XI of the Bankruptcy Act (11 U.S.C. §711).

To hold otherwise would be to recognize a clearly unconscionable and self-serving contract by adhesion exacted by the Telephone Company, the owner and operator of a monopolistic utility, from the Debtor under circumstances which deny the implied covenant in all contracts that the parties will act in good faith. Such conduct, if condoned, would permit the destruction of the underlying rehabilitative purposes and policies of the Bankruptcy Act as well as to permit the Telephone Company to exact payment in full from this Debtor for the privilege of utilizing that which is a necessity if its business is to continue, while the other unsecured creditors of the same class as the Telephone Company face the distinct possibility of receiving substantially less than payment in full on their claims.

Such a result violates the basic precept of the Bankruptcy Act that creditors shall be treated equally with respect to their claims and would deprive the Bankruptcy Court of the duty imposed upon it by Congress to adjudicate the validity and the amount of creditor claims.

The abhorrent result is that preferential treatment is condoned, if not made the ideal, and the administration of estates under the Bankruptcy Act is impeded and delayed, all to the ultimate disadvantage of all of the creditors of the estate.

It is respectfully submitted that the Order of the District Court should be reversed and that the Findings and Order of the Referee in Bankruptcy should stand.

Respectfully submitted,

GENDEL, RASKOFF, SHAPIRO & QUITTNER

By Nathan Markowitz

Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Nathan Markowitz

NATHAN MARKOWITZ

§2. Creation of courts of bankruptcy and their jurisdiction

(a) The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to --

. . . . . .

(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this title: Provided, however, That an injunction to restrain a court may be issued by the judge only;

. . . . . .

§70. Title to Property. a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be

exempt, to all of the following kinds of property wherever located . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized impounded, or sequestered: Provided, That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process: And provided further, That when any bankrupt, who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets;

. . . . . .

b. The trustee shall assume or reject an executory contract, including an unexpired lease of real property, within

sixty days after the adjudication or within thirty days after the qualification of the trustee, whichever is later, but the court may for cause shown extend or reduce the time. Any such contract or lease not assumed or rejected within that time shall be deemed to be rejected. If a trustee is not appointed, any such contract or lease shall be deemed to be rejected within thirty days after the date of the order directing that a trustee be not appointed. A trustee shall file, within sixty days after adjudication or within thirty days after he has qualified, whichever is later, unless the court for cause shown extends or reduces the time, a statement under oath showing which, if any, of the contracts of the bankrupt are executory in whole or in part, including unexpired leases of real property, and which, if any, have been rejected by the trustee. Unless a lease of real property expressly otherwise provides, a rejection of the lease or of any covenant therein by the trustee of the lessor does not deprive the lessee of his estate. A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the lease or give the other party an election to terminate the same is enforceable.

A trustee who elects to assume a contract or lease of the bankrupt and who subsequently, with the approval of the court and upon such terms and conditions as the court may fix after hearing upon notice to the other party to the contract or lease, assigns the contract or lease to a third person, is not liable for breaches occurring after the assignment.

. . . . . .

Sec. 311. Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, whever located.

. . . . . .

Sec. 343. The receiver or trustee, or the debtor in possession, shall have the power, upon authorization by and subject to the control of the court, to operate the business and manage the property of the debtor during such period, limited or indefinite, as the court may from time to time fix, and during such operation or management shall file reports thereof with the court at such intervals as the court may designate.

. . . . . .

Sec. 351. For the purposes of the arrangement and its acceptance, the court may fix the division of creditors into classes and, in the event of controversy, the court shall after hearing upon notice summarily determine such controversy.

. . . . . .

4. The operating businesses of the debtor consist of a heavy industrial machine shop and a leasing business. Among the assets of said businesses are the following telephone numbers: 723-6361, 728-7221, 685-7127, 723-3406, 685-7348 and 685-7545.

. . . . . .

20. Rule 11(A) of Respondent's Rules and Regulations (Schedule Cal. P.U.C., 36-T 2d Revised Sheet) provides for the adjudication of any dispute concerning the bills rendered by Respondent to its subscribers for telephone and advertising directory service by the Public Utilities Commission of the State of California after and only if the subscriber deposits the amount claimed by the Respondent with the Public Utilities Commission of the State of California with fifteen (15) days of being given notice to that effect by the Respondent. Upon the Receiver's failure to make such a deposit with the Public Utilities Commission and to submit to an adjudication by that Commission, the Respondent claims the right to discontinue telephone service to the numbers mentioned above. Application of that rule and regulation to the Receiver in the instant case would have the effect of depriving the Bankruptcy Court of its exclusive jurisdiction to classify and adjudicate

the claims of creditors.

. . . . . .

23. Particular telephone numbers, used by businesses over a period of time, acquire value and are normally transferred with a sale of the business either as part of the good will of said business or as a separate asset, to which a specific dollar value is attached. In either event, and as a matter of general business practice, the telephone number of a going business has value, is transferrable and is an intangible asset of that business.

24. For so long as the Petitioner pays current telephone bills promptly it is reasonable to extend the time within which the Receiver will determine whether and which telephone numbers he will retain; this will aid in the administration of this estate and the formulation of a Plan of Arrangement and will in no way prejudice Respondent or cause it any harm or damage.